No. 73-861

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
DEC 3 1973
MICHAEL RODAK, JR., CLERK

EAST CARROLL PARISH SCHOOL BOARD,
AND EAST CARROLL PARISH POLICE JURY,

Petitioners,

v.

STEWART MARSHALL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

JOHN F. WARD, JR.,
770 North Street,
Baton Rouge, Louisiana 70802.

CHARLES R. BRACKIN,
Varco Building,
405 Morgan Street,
Lake Providence, Louisiana 71254.

TABLE OF CONTENTS

Page

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT

I. Court of Appeals decision conflicts with decisions of this Court 12

II. Court of Appeals decision, if not in conflict, raises a substantial federal question which should be resolved 14

III. Court erred in reversing District Court findings of fact on record before it 16

IV. The reapportionment plan with least deviation and least dilution should be approved 19

CONCLUSION 20

CERTIFICATE 21

APPENDIX

A. Opinion and decree of United States District Court for Western District of Louisiana 23

B. First opinion of Court of Appeals for the Fifth Circuit 27

C. En banc opinion of Court of Appeals for the Fifth Circuit 43

Page

D. Louisiana Revised Statutes, Title 33, Section 1221 81

E. Louisiana Revised Statutes, Title 17, Sections 71.1 through 71.6 83

TABLE OF AUTHORITIES

Cases Cited *Page*

Burns v. Richardson, 384 U.S. 73 (1966) 12

Carroll v. Monroe City School Board, ___ F.2d ___ (No. 72-2505, Fifth Circuit, September 13, 1973) 16

Dyer v. Love, 307 F.Supp. 974 (1969) 6

Focash v. Addison Crane Company, Inc., 120 App. D.C. 308 18

Fortson v. Dorsey, 379 U.S. 433 (1965) 12

Kirkpatrick v. Preisler, 394 U.S. 526, 22 L.Ed.2d 519, 89 S.Ct. 1225 19

Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 19

Whitcomb v. Chavis, 403 U.S. 124 (1971) 12, 19

White v. Regester, ___ U.S. ___, 37 L.Ed.2d 314 (1973) 12, 13, 19

Constitutional Provisions Cited

U.S. Const., Amend. XIV 3, 7

U.S. Const., Amend XV 3, 7

United States Statutes Cited

28 U.S.C. Sec. 1254(1) 3

42 U.S.C. 1971, 1973(c) 3, 7

Louisiana Statutes Cited

LRS 17:52 4

LRS 17:71.1-71.6 ..... 3, 4, 5, 6

LRS 33:1221, et seq 3, 4, 5, 6

No._____

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EAST CARROLL PARISH SCHOOL BOARD,
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v.

STEWART MARSHALL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, en banc, on rehearing, rendered on September 12, 1973, reversing its previous decision entered on August 3, 1972.

CITATIONS TO OPINIONS BELOW

The decision of the District Court is unreported and is printed as Appendix "A" hereto, page 23. The original panel decision of the Circuit Court of Appeals is printed as Appendix "B" hereto, page 27, and is reported in 467 F.2d 1381. The decision of the Circuit Court of Appeals on rehearing en banc is

unreported and is printed as Appendix "C" hereto, page 43.

JURISDICTION

Judgment of the District Court was entered on August 2, 1971. The original judgment of the Court of Appeals was entered on August 3, 1972. Rehearing was granted, and the opinion of the Court of Appeals on rehearing en banc was entered on September 12, 1973. On October 29, 1973, the Court of Appeals stayed the issuance of mandate through December 2, 1973, pending this application for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Does a reapportionment plan for a small political subdivision which provides for residence requirements but at large elections unconstitutionally dilute Negro voting strength where Negroes constitute a 58.7 percent majority of the population, and the District Court specifically found:

A. That the evidence adduced by intervenor failed to show that the plan offered by the two aforesaid public bodies would discriminate against blacks or in any manner dilute the black population;

B. That the plan recommended by East Carroll Parish Police Jury and East Carroll Parish School Board has actually been in effect in East Carroll Parish since December 2, 1968, and the plan has not proved discriminatory against blacks;

C. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not.

D. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board does not dilute nor discriminate against the black population as the new voting unit from which officers of the jury and the board are to be elected is comprised of 58.7 percent blacks, or a substantial majority of blacks, while other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board.

And, in subsequent elections held under the at large plan while this case has been on appeal, Negroes were elected to two of the three seats available.

STATUTES INVOLVED

The statutes and constitutional provisions involved in this case are the Fourteenth and Fifteenth Amendments to the Constitution of the United States of America; 42 U.S.C. 1973(c); Louisiana Revised Statutes, Title 33, Section 1221 (Louisiana Act 445 of 1968); Louisiana Revised Statutes, Title 17, Section 71.1 through 71.6 (Louisiana Act No. 561 of 1968).

STATEMENT OF THE CASE

Jurisdiction of the District Court was invoked by the original plaintiff because of a question arising

under the Fourteenth Amendment to the United States Constitution.

The jurisdiction of the District Court was invoked by intervenor-respondent because of questions arising under the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965.

Prior to 1968 the parishes (counties) of Louisiana were divided into geographical wards. The members of the governing authority of the parish, the police jury, were elected from those wards according to a population formula. LRS 33:1221, 1222, 1223, and 1224. At the same time, LRS 17:52 provided, with respect to the school board in each parish, that the voters of each police jury ward would elect a member of the school board for such parish for each police juror in said ward.

However, when the Louisiana Legislature convened in May of 1968, both the Louisiana School Boards Association and the Police Jury Association, anticipating the need to reapportion under applicable decisions of this Court, proposed legislation to amend and/or repeal the existing statutes so as to permit each school board and police jury to reapportion itself in accordance with law.

As a result, the Louisiana Legislature of 1968 adopted Act 445 repealing the above referred to provisions relating to police juries and replaced them with basically one provision which permitted the police jury to reapportion itself and to determine the number of members it would have and how they would be elected.

(LRS 33:1221) (Appendix "D") The Legislature likewise adopted Act 561 of 1968 also repealing the above quoted sections relative to school boards and replacing it with a thorough revision (LRS 17:71.1 through 71.6) permitting school boards to reapportion themselves completely independent of the police jury and gave them permissive authority to utilize at large elections. (See Appendix "E")

These two acts became effective on July 20, 1968, prior to the original complaint being filed in this case. Pursuant to this authorization, the East Carroll Police Jury appointed a reapportionment committee to study the reapportionment of that body. However, before that body could decide how it wanted to reapportion itself, the original complaint was filed herein in July, 1968, contending that the two bodies were malapportioned and requesting the District Court to order their reapportionment.

As a result of this complaint the District Court enjoined the upcoming election and ordered both bodies to submit constitutionally acceptable reapportionment plans to it. Subsequently, the East Carroll Parish Police Jury submitted to the Court a reapportionment plan, concurred in by the School Board, providing that one resident police juror and one resident school board member would be elected from each of newly created Wards Numbers 1, 2, 4, 5, 6 and 7, and three police jurors and three school board members from newly created Ward 3, but with all members of the Police Jury and School Board to run at large throughout the entire parish. This plan of reapportionment was approved by the District Court on December 2, 1968,

with subsequent elections to be held in accordance therewith.

Subsequent thereto, on June 26, 1969, and September 10, 1969, the Attorney General of the United States notified the Attorney General of Louisiana that he was interposing an objection to Acts 445 and 561 of the 1968 Legislature, indicating that his objection was directed at that feature of the act which would permit multi-member districts. Also, on August 7, 1970, the Attorney General advised the East Carroll Police Jury that it could not implement its reapportionment plan because of his objection entered to Acts 445 and 561 which rendered such enabling legislation inoperable under *Dyer v. Love*, 307 F.Supp. 974 (1969), even though the District Court had approved and ordered implementation of the plan prior to the Attorney General's objection.

The Louisiana School Boards Association immediately pointed out to the Attorney General that since any reapportionment plan of any local political subdivision must be submitted to him for approval, any discriminatory use of the at large feature of the state act could be objected to by him at that time and that it was not objectionable until used in a discriminatory manner by some school board. Although discussions with the Attorney General in early 1970 left us expecting official withdrawal of his objections to the enabling legislation, it was not until after further discussion and correspondence that the Attorney General officially withdrew his objection by letter of April 14, 1972.

In the meantime, the District Court on its own

motion on February 17, 1971, requested the Police Jury and School Board to resubmit reapportionment plans based upon the official 1970 census. Pursuant to that request, on March 11, 1971, each body resubmitted the same plan previously approved, as the 1970 census figures did not change the deviation or render the previous reapportionment plan defective in any way.

On May 6, 1971, respondent, Stewart Marshall, intervened in this matter alleging that the at large system of elections violated his rights and others similarly situated by diluting the voting strength of black voters in East Carroll Parish in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, the Voting Rights Act of 1965, 42 U.S.C. 1971, et seq., and because the reapportionment plan was contrary to the laws of Louisiana in that the Attorney General's objection voided Acts 445 and 561 and there was, therefore, no authority for at large elections. Intervenor filed two alternate plans for reapportionment, both of which consisted of both single and multi-member districts. The District Court ordered the Police Jury and School Board to file alternative plans, which they did, although reiterating their beliefs that the existing at large system was the best.

The original plaintiff did not participate in any proceedings in this case subsequent to the above intervention. The Governor of Louisiana and other state officials were only nominal parties in interest and have also not participated in these proceedings.

On July 29, 1971, the District Court held a hear-

ing during which intervenors presented statistical evidence and witnesses who testified that in their opinion the at large plan was discriminatory as to blacks and would dilute their voting strength. The substance of their testimony was that, in their personal opinion, even though blacks constituted 58.7 percent of the population of the parish, they might not all vote for a black candidate; and, therefore, blacks might not get elected. The District Court also had before it opposing testimony of persons who testified as to the benefits to be derived from the at large system. In addition, the District Court also had before it the fact that two black members of the Police Jury had voted for the at large proposal although the black member of the School Board had voted against it.

Furthermore, as pointed out by Judges Clark, Dyer, Morgan and Roney in their dissent to the en banc majority opinion

> "The proof adduced in the District Court concerning the operation of the at-large election plan which governed the 1970 elections in this parish disclosed that a black candidate in the primary election for the Police Jury was defeated by only 9 votes. Another black candidate qualified for the second primary in which he ran third, 12 votes behind the second place white candidate. *A third black candidate won in his contest against the incumbent [white] president of the Police Jury, polling more votes than any candidate, not just for this post but in the entire election.*"

After considering all of the evidence, statistics, testimony of witnesses and all of the plans presented, the District Court on August 2, 1971, issued its order

and judgment reapproving the previously approved at large plan and setting forth the following seven specific findings of fact:

1. That according to the 1970 U.S. Census, East Carroll Parish has a total population of 12,884 persons of which number 7,568 are blacks and 5,306 are whites and other nationalities; that the black population of East Carroll Parish, Louisiana, comprises 58.7 percent of the total population.
2. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not.
3. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board does not dilute nor discriminate against the black population as the new voting unit from which officers of the jury and the board are to be elected is comprised of 58.7 percent blacks, or a substantial majority of blacks, while other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board.
4. That the plan recommended by East Carroll Parish Police Jury and East Carroll Parish School Board has actually been in effect in East Carroll Parish since December 2, 1968, and the plan has not proved discriminatory against blacks.
5. That the plan represents the wishes of both public bodies, having been endorsed by two of

the three black public officials now serving on these public bodies.

6. That the plan of apportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is a constitutionally acceptable plan and meets all of the requirements of the "one-man, one-vote" rule of law.
7. That the evidence adduced by intervenor failed to show that the plan offered by the two aforesaid public bodies would discriminate against blacks or in any manner dilute the black population.

Findings 1, 2 and 6 dealt primarily with the one-man, one-vote rule *but* findings 3, 4, 5 and 7 dealt specifically with the question of dilution of the strength of black voters and clearly found that there was no *proof* of discrimination or dilution, that the plan in operation had not operated to discriminate or dilute black voting strength, and that the other plans diluted the black population of different areas within the parish significantly greater than the plan offered by the Police Jury and School Board.

Respondent then noticed his appeal to the Fifth Circuit Court of Appeals on August 9, 1971. Respondent's brief was filed with the Court of Appeals on December 1, 1971, with petitioner's brief following on December 15, 1971, with oral argument heard on April 5, 1972. On March 23, 1972, respondent filed a motion with the District Court praying that the order of August 2, 1971, then on appeal to the Court of Appeals, be withdrawn and a new reapportionment plan, filed with his motion, be ordered. The District Court, for some inexplicable reason, without the benefit of

additional evidence, argument, or possibility of opposition by petitioner, issued such an order as prayed for by respondent. The Court of Appeals in its original decision of August 3, 1972, properly found that since the matter was on appeal, the District Court was without jurisdiction to enter the order of March 27, 1972, and vacated the order.

After this case was originally briefed and argued and at approximately the time of the original panel decision affirming the District Court in August, 1972, additional elections were held under the at large plan for three of the nine school board posts. (School board members in Louisiana are elected for terms of six years with approximately one-third (1/3) of the members of each board standing for election every two years.) Of the three School Board seats up for election in East Carroll in 1972, two blacks and one white candidate were elected under the at large plan. It is worth noting here that the incumbent black School Board member who voted against the at large plan and testified against it in the District Court, was overwhelmingly re-elected in these 1972 at large elections.

After the panel decision of August 3, 1972, respondent applied for a rehearing which was granted en banc and resulted in the nine to six split decision reversing the District Court and the previous panel decision of August 3, 1972. Six members of the Court of Appeals felt constrained to submit dissenting opinions. It is from this decision that petitioner applies to this Court for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The en banc decision of the Court Below in the instant case reversing its panel decision and the decision of the District Court by a narrow nine to six margin has decided an important federal question of reapportionment in a manner in conflict with applicable decisions of this Court in *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Burns v. Richardson*, 384 U.S. 73 (1966); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); and *White v. Regester*, ___ U.S. ___, 37 L.Ed.2d 314 (1973).

These cases have consistently held that multi-member districts are not per se unconstitutional although subject to attack when they have been used invidiously to cancel out or minimize the voting strength of racial groups. This Court has always, however, placed the burden of proof on the plaintiff attacking the multi-member districts to prove the discrimination and dilution. *White v. Regester* and *Whitcomb v. Chavis*, supra.

In the instant case the District Court clearly found that respondent here had not carried the burden of such proof during the trial and that evidence of the plan, in actual operation, refuted any allegation of discrimination or dilution. His findings were affirmed by the original panel decision of the Court below.

The reversal of these findings by a bare majority of the Court of Appeals sitting en banc would seem to be directly in conflict with the decision of this Court in the cited cases, particularly *Whitcomb v. Chavis* and *White v. Regester*, supra.

In *Whitcomb v. Chavis* this Court reversed a finding of the District Court that the multi-member districts would result in discrimination and dilution even though there was more possibility of same (Negroes being in the minority) than in the instant case. On the other hand, in *White v. Regester*, (which is similar to this case only in that Mexican-Americans constituted a majority of the population in Bexar County, Texas) this Court merely affirmed the District Court's findings that the large multi-member districts of Dallas and Bexar Counties diluted the voting strength of blacks in Dallas County and of Mexican-Americans in Bexar County. In affirming the District Court's findings with respect to the multi-member plan for Dallas County, this Court merely said:

> ". . . *these findings* and conclusions are sufficient to sustain the *District Court's judgment* with respect to the Dallas multi-member district and, *on this record, we have no reason to disturb them. . .*" (Emphasis added)

And with respect to Bexar County,

> "The District Court apparently paid due heed to Whitcomb v Chavis, supra, did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, *from its own special vantage point*, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participating in political life, specifically in the election of representatives to the Texas House of Representatives. *On the record before*

> *us, we are not inclined to overturn these findings*, representing as they do a blend of history and an *intensely local appraisal of the design and impact* of the Bexar County multimember district *in the light of past and present reality, political and otherwise.* (Emphasis added)

In the instant case, the District Court has also made an on-the-ground and "intensely local appraisal" from its "own special vantage point" and found that the at large system as designed and operated in East Carroll Parish did not invidiously exclude Negroes from effective participation in political life.

This District Court's findings, likewise, and on this record, should not have been overturned by the Court below in view of the decisions of this Court, and such action would appear to be in direct conflict with the above cited decisions of this Court.

II. Even if the en banc decision of the Court below is not in direct conflict with the cited decisions of this Court, it would appear clear that the decision, at the very least, has decided an important question of federal law which has not been, but should be, settled by this Court.

It apparently stands for the proposition that no matter what findings are reached by the trier of facts, the District Court, that no political subdivision in the South, no matter what its size may be, its population, its ethnic make-up, or the actual effects in operation of its reapportionment plan, may have the members of its governing authority elected from multi-member districts or elected at large.

Even though the United States District Courts in Louisiana have rejected some reapportionment plans containing multi-member districts, they have likewise approved other plans containing multi-member districts. The en banc decision in the instant case would appear to invalidate all previously approved multi-member district plans.

It would also seem to invalidate the historical structure and organization of some school boards in Louisiana which have always, since they were created by the Legislature, had their members elected at large within the entire parish. The reason for such at large structure and organization is that since a school system serves all the children in the parish, each member of the board should feel a responsibility for the improvement of all schools in the parish and should be responsible to all of the people in the parish.

One such example is the Monroe City School Board, which was created by the Legislature in 1900 with five members consisting of the mayor of the City of Monroe and four members elected at large. The act creating the Monroe City School Board was amended in 1947 to eliminate the mayor as a member but providing for the election of a replacement member at large. Although the creation of this School Board with such internal structure and organization had nothing to do with race, this same District Court required that School Board (which was perfectly apportioned and had no change in election procedure to submit to the Attorney General under the Voting Rights Act of 1965) to change its structure and or-

ganization from at large elections to single member districts because there was a geographically recognizable Negro *minority* population in the city. The Court of Appeals affirmed without opinion under Fifth Circuit Local Rule 21, citing only the instant cast for authority. See *Carroll v. Monroe City School Board*, _____ F.2d _____ (No. 72-2505, Fifth Circuit, September 13, 1973)

Another such example is the Orleans Parish School Board, which has also historically been structured and organized so as to be composed of five members elected at large from Orleans Parish. Although a Negro candidate was narrowly defeated in a recent second primary, his defeat had nothing to do with race and the sole issue in the campaign was union organization of teachers. Moreover, another Negro is presently serving a six-year term on the School Board and last year served as president of the Board. Must the Orleans Parish School Board now restructure and organize itself because of this decision of the Court Below?

III. Although the en banc decision of the Court of Appeal found that "the District Court erred in finding that the at large plan did not dilute the black vote in East Carroll . . . .", it did not find the District Court's finding to be "clearly erroneous" or "manifest error" as required under Rule 52 of the Federal Rules of Civil Procedure. Clearly, there was substantial evidence to support the trial court's finding of fact as to dilution. Population of the parish was majority black and blacks had been elected under

the at large plan. In addition, two of the three black members of these two governing bodies voted for the at large plan.

Although the Court Below referred to ". . . a panoply of factors . . ." which this Court had supposedly identified which may contribute to the existence of dilution, most of the factors mentioned by the Court are not present in the record in this case. Even if there is some evidence in the record from testimony of some witnesses, the trial court who heard the witnesses clearly found that their testimony was not sufficient. For example, there is nothing in the record to support a lack of access to the process of slating candidates, or the unresponsiveness of legislators. In East Carroll Parish there is no slating of candidates. Ninety-five percent of the voters, black and white, in East Carroll Parish are registered as Democrats. Election in the Democratic primary is tantamount to election. Any registered Democrat can become a candidate for office in the Democratic primary and the Democratic party, as such, makes no attempt whatever to slate any particular candidates. Furthermore, although the Court cites as one factor, "the lack of provision for at large candidates running from particular geographical subdistricts" the plan under attack does provide for the at large candidates to run from a particular geographical subdistrict.

Taken all in all, it is virtually impossible for the Court Below to have found the findings of fact of the District Court to be "clearly erroneous." As

was held by the Court in *Focash v. Addison Crane Company, Inc.*, 120 App. D.C. 308, 346 F.2d 420,

> The question is not whether the Court of Appeals would have reached the same result but whether there is substantial evidence to support the findings and conclusions of the trier.

It would also appear that the Court of Appeals erred in refusing to consider the results of the 1972 elections under the at large plan which occurred while this matter was on appeal. Not only were the results of these elections tendered to the Court on appeal, they are matters of public knowledge of which the Court could take judicial notice. At the very least, the Court should have remanded to the District Court in order that evidence of the result of those elections could have been introduced and considered by the District Court. Obviously, they would have reinforced the District Court's previous findings as he had considered the 1970 elections under the at large plan at the 1971 hearing. Furthermore, the one black official who voted against the at large plan, and testified in Court against it, was overwhelmingly re-elected in 1972 under the at large plan.

The second reason assessed by the en banc opinion for not considering the 1972 elections is a rather tenuous suggestion that some politicians at some time might support a black candidate because it is politically expedient. If so, it would not be the first time that one politician has supported another politician because it is politically expedient.

Clearly, these tenuous possibilities mentioned by the en banc decision are not sufficient to overturn the findings of the District Court who specifically found that they did not happen and certainly these tenuous possibilities are not what this Court was referring to in *Whitcomb v. Chavis*, supra, when it reversed the District Court finding of dilution which was based on far more solid reasoning than the tenous possibilities discussed by the *Court of Appeals* here, or in *White v. Regester*, supra, when it declined to overturn the *on the ground findings of the District Court.*

IV. In *Burns v. Richardson*, supra, this court had indicated that it was the responsibility of the state (the appropriate political subdivision) to properly reapportion itself. The two public bodies in the instant case had completed reapportionment almost three years prior to the respondent appearing in this matter.

This court had further indicated in *Reynolds v. Sims*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362, and *Kirkpatrick v. Preisler*, 394 U.S. 526, 22 L.Ed.2d 519, 89 S.Ct. 1225, that a public body reapportioning itself should attempt to devise a plan with the least possible deviation. The plan adopted by these two public bodies complies with that admonition in that their plan contains no deviation at all.

While the en banc opinion of the court below appears to erroneously reverse the finding of the District Court that there is no dilution, as pointed out herein before, it did not reverse the District Court's finding No. 2 that the plan of these public bodies

> "... is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not."

or the District Court's finding No. 3 that

> "... other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board ..."

It would appear clear from the cited decisions of this court, as well as other decisions of the court below, that although a particular apportionment plan may have some dilutive (or possibly dilutive) effect on black voting strength, it is still to be preferred, and approved, where it has less deviation and less dilutive effect than other plans before the court.

It would appear clear that this principle is particularly applicable in the instant case and the district court should have at least been affirmed on that basis.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

John F. Ward, Jr.
Counsel for Petitioners

CERTIFICATE

I, John F. Ward, Jr., attorney for petitioners and a member of the Bar of the United States Supreme Court, do hereby certify that on this 30th day of November, 1973, I served copies of the foregoing petition for writ of certiorari on the attorneys of record for respondent herein, Mr. Stanley A. Halpin, Jr., and Mr. George M. Strickler, Jr., by mailing three copies of same, postage prepaid, to them at their offices at 906 Carondelet Building, 226 Carondelet Street, New Orleans, Louisiana, 70130, and 1110 Royal St., New Orleans, La. 70116, respectively.

John F. Ward, Jr.
Counsel for Petitioners

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CHARLES F. ZIMMER (Civil Action No. 13927)

VERSUS

JOHN J. MCKEITHEN ET AL

*** * ***

DECREE PROVIDING FOR THE REAPPORTIONMENT OF POLICE JURORS AND SCHOOL BOARD MEMBERS IN EAST CARROLL PARISH, LOUISIANA, ETC.

This Court having ordered East Carroll Parish Police Jury and East Carroll Parish School Board to submit their constitutionally satisfactory plans for the reapportionment of their respective bodies in accordance with the "one man - one vote" rule announced in *Avery vs. Midland County, Texas,* (Sup. Ct., April, 1968) 88 S. Ct. 1114, and subsequent cases; and East Caroll Parish Police Jury and East Carroll Parish School Board having submitted their respective plans for reapportionment to this Court; and intervenor having submitted a plan of reapportionment for each of said bodies as well as alternate plans of reapportionment; and the Court having conducted a hearing on July 29, 1971, at which the witnesses called by the respective parties were examined and cross-examined by the parties and the court; and the court having considered all plans presented as well as all alternate

plans proposed by the parties hereto, it has made the following finding of facts:

1. That according to the 1970 U. S. Census, East Carroll Parish has a total population of 12,884 persons of which number 7,568 are blacks and 5,306 are whites and other nationalities; that the black population of East Carroll Parish, Louisiana, comprises 58.7 percent of the total population.

2. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not.

3. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board does not dilute nor discriminate against the black population as the new voting unit from which officers of the jury and the board are to be elected is comprised of 58.7 percent blacks, or a substantial majority of blacks, while other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board.

4. That the plan recommended by East Carroll Parish Police Jury and East Carroll Parish School Board has actually been in effect in East Carroll Parish since December 2, 1968, and the plan has not proved discriminatory against blacks.

5. That the plan represents the wishes of both

public bodies, having been endorsed by two of the three black public officials now serving on these public bodies.

6. That the plan of apportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is a constitutionally acceptable plan and meets all of the requirements of the "one-man, one-vote" rule of law.

7. That the evidence adduced by intervenor failed to show that the plan offered by the two aforesaid public bodies would discriminate against blacks or in any manner dilute the black population.

ACCORDINGLY, IT IS HEREBY ORDERED, AND DECLARED that East Carroll Parish, Louisiana, be and it is hereby reapportioned as follows:

East Carroll Parish, Louisiana, be and it is hereby subdivided into seven wards, each of which shall conform to the same geographical boundaries and areas as the existing wards; each newly created ward shall be numbered as the existing ward which it replaces; that one (1) Police Juror and one (1) School Board member shall be elected from each of the newly created wards numbered 1, 2, 3, 4, 6, and 7, and three (3) Police Jurors and three (3) School Board members from the newly created Ward Three (3), all Police Jurors and School Board members to be elected at large throughout East Carroll Parish, Louisiana; and that the newly created Police Jury offices and School Board offices be filled as the terms of the present office holders expire, according to and

in the manner prescribed by the Louisiana election laws applicable thereto.

IT IS FURTHER ORDERED, that all or any part, of any order previously issued herein which is in conflict herewith is hereby revoked and rescinded.

Signed at Shreveport, Louisiana, this 2nd day of August 1971.

/s/ BEN C. DAWKINS, JR., Chief Judge,
United States District Court for the
Western District of Louisiana

Approved as to form:

/s/ WILLIAM B. RAGLAND, JR.
Attorney for East Carroll Parish
Police Jury and East Carroll
Parish School Board

Appendix B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2649

CHARLES F. ZIMMER,
Plaintiff,

STEWART MARSHALL,
Intervenor-Appellant,

versus

JOHN J. McKEITHEN, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(August 3, 1972)

Before GEWIN, COLEMAN and INGRAHAM, Circuit Judges.

COLEMAN, Circuit Judge: East Carroll is a small parish (county) located in the northeast corner of Louisiana. It adjoins the Mississippi River on the east and the State of Arkansas on the north. The area of the

parish is 452 square miles. In 1970, it had 7568 black and 5316 white inhabitants; 59% black and 41% white. Lake Providence, the parish seat, has a population of 6183, about half of all the people in the parish. The remaining populace is scattered over an area of 450 square miles, at an average population density of fifteen persons per square mile.

Since 1968, the parish has been embroiled in litigation over the one man-one vote apportionment of its wards for the election of police jurors (county commissioners) and school board members. As they existed in 1968 the wards fell far short of compliance with the one man-one vote rule. The sole issue is the method to be used in bringing the parish into compliance with that constitutional principle.

The litigation was initiated by a white citizen of the parish, who sought enforcement of the rule. Thereafter, Stewart Marshall was allowed to intervene on behalf of himself and the class of black voters in East Carroll. The intervenor urged that allowing the police jury and school board to be elected from the parish at-large denied the rights of black voters secured by the Fourteenth Amendment, the Fifteenth Amendment, and the Voting Rights Act of 1965. However, no three judge court was convened as required in Voting Rights Act cases. See *Allen v. Board of Electors*, 1969, 393 U.S. 544 and *Perkins v. Matthews*, 1971, 400 U.S. 379.

This appeal emanates from a hearing held on August 2, 1971, after which the District Court adhered to its

previously adopted parish at-large election plan. Notice of appeal, with the necessary appeal bond, was filed on August 9, 1971. The plaintiff's brief in this Court was filed December 1, 1971. The appellees' brief followed on December 15. Oral argument in this Court was scheduled for, and did take place, April 5, 1972.

In the meantime the original plaintiff was allowed to withdraw and the litigation was pursued by the intervenors.

On March 23, 1972, the plaintiff-intervenor-appellant, Stewart Marshall, filed a motion before the District Court, praying that the order of August 2, 1971, *then on appeal to this Court*, be withdrawn and that the parish officers be elected by wards according to a plan of population equalization which was filed with the motion.

On March 27, 1972, the District Court by detailed order, approved the plan thus submitted, reapportioning the parish by wards, and directing that police jury and the parish school board should be elected accordingly. The wards were of unequal population, so in some instances more than one official was to be elected from a particular ward, depending on its population quotient.

In the absence of exceptions not applicable to the situation now before us, once an appeal is taken, jurisdiction passes to the appellate court, *Turner v. HMH Publishing Company*, 5 Cir., 1964, 328 F.2d 136, 137;

Janousek v. Doyle, 8 Cir., 1963, 313 F.2d 916, 920; *Thompson v. Erb*, 3 Cir., 1957, 240 F.2d 452, 454.

The District Court was therefore without jurisdiction to enter the order of March 27, 1972. Since the defendants have duly appealed its entry that order is hereby vacated.

This leaves for disposition the judgment of August 2, 1971, *the original subject of this appeal.* That judgment was the result of a hearing conducted on July 29, 1971, at which the parties to the litigation submitted several plans of reapportionment and witnesses were examined.

The District Court then found that the black population of East Carroll comprised 58.7% of the parish, that the plan of reapportionment offered on behalf of the police jury and school board was more satisfactory than any other plans presented because it offered a "zero deviation" while the other plans did not; that the plan did not discriminate against the black population nor dilute its voting strength, whereas other plans did dilute the black population of different areas within the parish; that the plan adopted had been endorsed by two of the three black public officials then serving on the police jury and the school board; hence the plan would be approved by which the parish would be divided into seven wards and that one police juror and one school board member would be elected from each of the wards, except that three would be elected from Ward 3, with all officials to be "elected at-large throughout East Carroll Parish".

As stated, this is the judgment now before us for review.

On appeal, Stewart Marshall, and the class he represents, do not contend that the District Court findings are clearly erroneous. They do urge that the District Court was without power to order parish at-large elections because under Section 5 of the Voting Rights Act of 1965 the Attorney General of the United States had duly objected to Louisiana statutes which would have permitted at-large elections for school board and police juries. The Attorney General held, as a general proposition, that such elections discriminated against Negro voters on account of their race and denied them an effective voice in the election of parish officials. The Attorney General thus denied approval to state statutes of general application and appellants say this was binding on the District Court in the exercise of its equity jurisdiction in a case primarily concerning the application of the one man-one vote rule.

It must be noted that this is not a case in which a legislature, board, or commission attempted to reapportion itself. In such a case, Section 5 clearly applies. What we have here is an adversary action, invoking the equity jurisdiction and the equitable adjudication of the District Court. As the Supreme Court succinctly said in *Connor v. Johnson*, 402 U.S. 690, 91 S.Ct. 1760, ____ L.Ed.2d ____, and as this Court said in *Sheffield v. Itawamba County Board of Supervisors*, 5 Cir., 1971, 439 F.2d 35, *court ordered plans* resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5. If this were not

so, the exercise of jurisdiction by the courts would be meaningless. The Attorney General has no authority to review or to set aside the judgments of courts duly entered in the exercise of their jurisdiction over the parties and the subject matter.

Allen v. Board of Elections, 393 U. S. 544 (1969) was concerned with legislative enactments, not judicial determinations. Neither had there been any prior litigation or judicial determination in *Perkins v. Matthews*, 400 U.S. 379 (1971).

On June 3, 1971, the Supreme Court entered its Per Curiam opinion-order in *Connor v. Johnson, supra. Connor* involved the election of twelve Representatives from Hinds County, Mississippi, pursuant to a court ordered plan of reapportionment. The Three-Judge District Court had directed that these twelve state legislators be elected from the county at-large. The Supreme Court, on the representations contained in the briefs and on the language contained in the lower court decision, directed the District Court, "absent insurmountable difficulties, to devise and put into effect a single-member district plan * * * *."

It is to be noted, however, that Hinds County had a population of 214,973 and a representative was required for a population norm of 18,171 per seat. In an at-large election the candidate would have to make the race before 196,802 more people (twelve times the number) than was required for a single-member district. As it developed in that case, there were insurmountable obstacles to the creation of single-member

districts within the time frame involved and the search continues for a solution.

In the case of East Carroll Parish the total population amounts to only 12,884. In 99% of the land area the population density averages only fifteen persons per square mile. There may be insurmountable difficulties to the creation of single-member districts for the election of police jurors and school board members. As to this, the present record presents no findings. The plan approved by the District Court after the perfection of this appeal had some multiple member wards.

We are unable to see how at-large elections in this small parish could possibly discriminate against its black citizens. They have a commanding majority of the total population. This majority would participate in the election of not one but of every police juror and every school board member in the parish. Every elected official would thus be answerable to all black citizens of the entire parish. On a single-member district plan, if such can be devised, the voters would have a voice in the election of only one member on the policy jury or the school board. It would, therefore, be just as easy to say, in the exercise of discretion, that a single district plan in this parish would more clearly dilute the voting power of the blacks than would one in which every voter, black and white, has the same identical voice in the selection of not one, *but all*, members of the elective body. As a matter of fact, the District Judge so found.

We are aware of no case in this Court or in the Supreme Court which has held that in the exercise of its jurisdiction to enforce the one man-one vote mandate of the Constitution a District Court *may not* direct that county officials be elected by all the voters of the county when there is no racially discriminatory purpose or effect.

It is true that in East Carroll 54% of the registered voters are white and 46% are black. This case is very much like *Howard v. Adams County Board of Supervisors,* 5 Cir., 1972, 453 F.2d 455, certiorari denied ____ U.S. ____, [40 L.W. 3598].

In Adams County 64% of the population lived in the City of Natchez. In a one man-one vote rearrangement of the five districts for the election of County Supervisors one district which formerly had a black population of 75% became a district with a white majority, and there were other radical changes as described in the opinion of the Court. The Court nowhere spoke of racial voting strength, *but of population.*

The Court[Judges Gewin, Goldberg, and Dyer] stated:

> "[W]e reject the plaintiffs' motion that they are constitutionally entitled to have old District Four divided into two predominately black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts." 453 F.2d at 458.

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> "Inevitably, people of different races, national origins, and contrasting tenets will be shifted under reapportionment plans to districts in which they may no longer be in the clear majority. But when, as here, no racial motivation spawns a change of the voting area of those complaining, and the redistricting plan does not unconstitutionally dilute the voting strength of the complaining minority, there is no abridgement of voting rights." 453 F.2d at 459.

On May 22, 1972, the Supreme Court affirmed, Per Curiam, [40 L.W. 3553] the decision of the Three Judge District Court in *Ferrell v. Hall,* 339 F. Supp. 73 (W.D., Okla., 1972).

In that case, the lower court held that in complying with the one man-one vote rule the Oklahoma Legislature was not required to create a single senate district in an area in which Negro citizens constituted a clear majority, and no denial of equal protection resulted from inclusion of part of the Negro community in each of three senate districts. Oklahoma is not covered by the Voting Rights Act of 1965, as is Louisiana, but it is subject to the Fifteenth Amendment.

The District Court, affirmed by the Supreme Court, said:

> "One feature of the complaint filed by the plaintiffs is a plea for apportionment of State

> Senatorial Districts in Tulsa County according to race. Such a color conscious approach to apportionment is but another form of racial segregation and is constitutionally impermissible (citing cases)." 339 F. Supp. at 83.

The order of the District Court in this case dated March 27, 1972, is vacated because that Court was without jurisdiction to enter it.

The conditional motion of Stewart Marshall (filed March 28, 1972) to dismiss the original appeal in this case is denied.

The judgment of the District Court dated August 2, 1971, is affirmed.

Any citizen of East Carroll Parish is, of course, free to come forth at any time in a new case with a plan which would divide the parish into single-member districts of equal population for the election of police jurors and school board members, to be adjudged on its merits when presented.

In the meantime, this four year old case in a small rural parish, with a Negro population majority of almost 3 to 2, is terminated and in that parish every vote for county officials is left to its equal weight with that of every other vote cast, regardless of race or any other consideration.

AFFIRMED.

GEWIN, Circuit Judge, Concurring in part and Dissenting in part:

I fully concur with the majority's conclusion that § 5 of the Voting Rights Act of 1965 does not compel the submission of court ordered plans to the Attorney General and that the district court was without jurisdiction to modify its August 2, 1971, reapportionment decree after an appeal had been taken from that decree and before this court had disposed of that appeal. However, I am very doubtful that the majority accords proper emphasis to significant facts in this case or that the correct legal standard has been applied to the facts. I therefore dissent from the affirmance of the August 2, 1971, reapportionment decree.

At the outset I feel constrained to point out that it appears that the majority fails to give adequate consideration to the appellant's contentions. Marshall and the class he represents do emphasize their contention that the court was without power to order at-large elections because of the Attorney General's disapproval of the Louisiana statutes. But Marshall also asserts that the court was *clearly erroneous* in finding that at-large elections do not dilute the voting strength of black voters of that parish.[1] I believe that Marshall is correct in this assertion.

It seems to me the majority errs in focusing exclusively on the total population ratio of the Parish. The standard which the Supreme Court has articulated is whether "designedly or otherwise, a multi-member constituency apportionment scheme, under the cir-

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[1] Appellants brief on appeal pp. 5, 15-17.

cumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson,* 384 U.S. 73, 88, 16 L.Ed.2d 376, 388 (1966); *Fortson v. Dorsey,* 379 U.S. 433, 439, 13 L.Ed.2d 401, 405 (1965).[2] The majority opinion presumes that since the blacks in East Carroll Parish constitute a numerical majority (59%) it is therefore impossible as a matter of law for their voting strength to be diluted, minimized or cancelled. The blacks in the Parish presently constitute a minority of the registered voters (46%). During the ten year period from 1961 to 1971 the black voter registration in the Parish increased from zero to approximately 2,899 (including 2,122 Federally registered voters) while the white registration increased from approximately 2,845 to 3,342.[3]

Louisiana law has for many years required the members of the Parish Police Jury and School Board to be residents of the ward from which they are elected and to be elected by the voters of the ward. L.R.S.

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[2]The majority opinion relies on Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir. 1972) to support its view that population, not voting strength, is determinative. That reliance appears inappropriate in view of Judge Dyer's discussion of the voting strength test, 453 F.2d at 457-58, and the approval of the district court's finding that the plaintiffs there had failed to show that the plan was a constitutionally impermissible dilution, minimization, or cancellation of the voting strength of the black citizens of Adams County, 453 F.2d at 458.

[3]These figures are based on the 1962 findings of the district court in the voter registration suit brought in the Parish, United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962), and on the State of Louisiana Board of Registration, Report of Registered Voters, month ending October 6, 1971. *See* Appellant's Brief, p. 3; Appellee's Supplemental Brief, p.1.

§ 33:1221, *et seq.;* L.R.S. § 17:51.[4] Prior to the court-ordered change to at-large elections in 1968, black representatives were elected from the wards to two seats on the Police Jury and to one seat on the School Board.

It is apparent to me that the change to elections at-large makes it substantially more difficult for black voters to elect representatives than under the traditional ward system which Louisiana law requires. The at-large election dilutes any possible majority of black registered voters in one or more new and impartially drawn wards with the overall majority of white registered voters in the Parish. It was precisely this sort of dilution which caused the Attorney General to disapprove under § 5 of the Voting Rights Act of 1965, 42 U.S.C., § 1973c, the Louisiana statutes which sought to amend the Louisiana law to allow at-large elections for school boards and police juries.

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[4]Until 1968, Louisiana law prohibited at-large elections for School Boards and Police Juries (the law required at least five wards from which the members of these bodies were to be elected). By Louisiana Acts of 1968 No. 445 Section 1 (amending La. R.S. 33:1221) and No. 561 (adding La. R.S. 17:71.1 — 71.6), Louisiana Law was amended to allow at-large elections (or elections from less than five wards) for School Boards and Police Juries.

On April 29, 1969, Acts 445 and 561 were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. On June 26, 1969, both Acts were rejected as having "the effect of discrimination against Negro voters on account of their race, and of denying to them an effective voice in the selection of Police Jury and School Board members." On September 10, 1969 this rejection was reaffirmed by the Attorney General of the United States, citing as a specific example of racial discrimination, the at-large scheme of elections in East Carroll Parish.

However it is not necessary to decide whether in the circumstances of this case the dilution rises to the level of a denial of 14th or 15th Amendment rights. In this case we need only determine whether the district court abused its discretion in fashioning an equitable remedy. We are not faced with taking the constitutional measure of an apportionment policy adopted by the state or one of its sub-divisions as was the court in *Ferrell v. Hall*, ____ U.S. ____, 32 L.Ed.2d 328 (May 22, 1972); *Whitcomb v. Chavis*, 403 U.S. 124, 29 L.Ed.2d 353 (1971) and *Burns v. Richardson*, 384 U.S. 73, 16 L.Ed.2d 376 (1966).

In *Conner v. Johnson*, 402 U.S. 690, 29 L.Ed.2d 268 (1971) the Supreme Court noted:

> ". . . [W]hen district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."

402 U.S. at 692, 29 L.Ed.2d at 271. See also, *Hall v. Issaquena County Board of Supervisors*, 453 F.2d 404 (5th Cir. 1971). No insurmountable difficulties of any kind have been demonstrated in this case. Both parties here presented the district court with a choice of various plans employing the traditional ward concept[5] which would have adequately solved the one-man one-vote problem without the dilution created by a wholly at-large scheme.

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[5]The Police Jury proposed an alternative plan for elections from districts in the event the district court found the at-large plan unconstitutional.

My view is not altered by this court's decision in *Howard v. Adams County Board of Supervisors*, 453 F.2d 455 (5th Cir. 1972). *Howard* approved the realignment of districts to comply with the one-man one-vote concept, not the adoption of an at-large election scheme. The white population constituted a numerical majority in Adams County and the black plaintiffs essentially sought to have the new districts drawn so as to assure two black majority districts. The Board of Supervisors adopted a reapportionment plan devised by an outside consulting firm, not the district court, which had been instructed to equalize the population in the districts and equalize the responsibilities of each supervisor. Finally, the plan in *Howard* had been submitted to the Attorney General for his approval and the Attorney General had indicated no objection.

While not controlling here, the disapproval of the Louisiana at-large election statutes by the Attorney General is strong evidence in support of Marshall's contention that the at-large scheme results in dilution of the black voting strength. Obviously the district court became dissatisfied with its own choice of a plan because the court sought to change its decree pending appeal to award the relief Marshall requested. I would vacate the district court's order of August 2, 1971 and remand the case for the entry of an appropriate apportionment decree.

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Appendix C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2649

CHARLES F. ZIMMER,

Plaintiff,

STEWART MARSHALL,

Intervenor-Appellant,

versus

JOHN J. McKEITHEN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(September 12, 1973)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

GEWIN, Circuit Judge: Aristotle has written:

If liberty and equality, as is thought by some, are chiefly to be founded in democracy, they

> will be best attained when all persons alike share in the government to the utmost.[1]

This case evokes a consideration of the extent to which the Constitution of the United States compels adherence to this principle. Specifically, we are called upon to determine under what circumstances an apportionment scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population.[2] Appellant contends that the district court order, affirmed by a majority of a panel of this court, requiring reapportionment for the school board and police juries in East Carroll Parish[3] under an at-large scheme of elections cannot pass muster under the aforementioned standard. Both the district court and a majority of a panel of this court held that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish.[4] Upon rehearing en banc, this court finds the aforementioned conclusion

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[1] Aristotle, Politics, Book II.

[2] White v. Regester, ____ U.S. ____, ____, 37 L.Ed.2d 314, 324 (1973); Whitcomb v. Chavis, 403 U.S. 124, 143 (1971); Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Burns v. Richardson, 384 U.S. 73, 88 (1966).

[3] In the absence of special legislative authority for school boards to apportion, the apportionment and reapportionment of parish school boards is dependent upon such apportionment of the police jury in the parish. Consequently, this case does not require a distinction between the reapportionment scheme as it affects either body.

[4] As shall be discussed *infra*, a majority of the panel refrained from announcing a per se rule. Rather, it qualified its application of the majority of population standards on the grounds proffered by appellees, namely the size of the parish.

infirm, and therefore we vacate and remand the district court's judgment.

I.

The panel opinion, recounting the facts which spawned this litigation and the protracted proceedings which it entailed, obviates the need for a full exposition of the present posture of this case. Consequently, we shall highlight only those facts particularly germane to our disposition.

East Carroll is a rural parish located in the extreme northeast corner of Louisiana. According to the 1970 census, it has a population of 12,884, of which 7,568, or 58.7% are black. Until recently, blacks in the parish, like all blacks in Louisiana, suffered from the maintenance of dual school systems, and the interposition of an interpretation test which preconditioned qualification for voting. Additionally, from 1922 to 1962, no black resident of the Parish had been permitted to register to vote. With the removal of state and locally imposed impediments to voting, and through the efforts of federal registrars, registration statistics in the parish changed dramatically. As of October 6, 1971, there were 3,342 whites and 777 blacks registered on the East Carroll rolls and an additional 2,122 federally registered black voters in the parish.[5] Concurrent

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[5] These figures are based on the 1962 findings of the district court in the voter registration suit brought in the Parish, United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962), and on the State of Louisiana Board of Registration, Report of Registered Voters, month ending October 6, 1971. *See* Brief of Appellant at 3, Zimmer v. McKeithen, No. 71-2649 (5th Cir. filed Dec. 1, 1971); Brief of Appellee at 1, *id.* (5th Cir. filed March 28, 1972).

with the increased registration of black voters, elections under the predecessor ward system produced two black members of the police jury and one black school board member.

The change from ward to at-large elections challenged herein was produced by the entry in 1968 of a district court order in a suit where petitioners sought to insure fidelity to the one-man, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964). Three years elapsed between the entry of this order and the renewal of proceedings precipitated by instructions issued by the district court that East Carroll submit a reapportionment plan in light of the 1970 census. Pursuant to these instructions, the Parish Police Jury resubmitted the 1968 at-large plan for approval. Subsequently, appellant Marshall was permitted to intervene on behalf of himself and all other similarly situated black voters in East Carroll, and challenge the propriety of the at-large plan as contravening the fourteenth and fifteenth amendments of the Constitution and Section 5 of the Voting Rights Act of 1965.[6] After the hearing conducted on July 29, 1971, the district court found, *inter alia*, that since under the at-large plan, there was a zero population deviation, the at-large plan did not dilute the voting strength of the black population. Accordingly, the district court ordered that police jury and school board elections be conducted pursuant to an at-large scheme of voting under which the parish was divided into 7 wards. Under this scheme, 6 of the wards were to elect 1 representative to the police jury and school

[6]Although Marshall clearly raised the Voting Rights Act issue in his Complaint in Intervention, the district court in its order in 1971 did not rule on this issue. Since he preserved this contention on appeal, it was before a panel of this court.

board, and 1 ward was to elect 3 representatives. Although candidates were required to reside in the ward from which they sought election, they were to be voted upon by registered voters in the entire county.

Marshall urged several grounds for reversal on appeal: first, that the district court was without power to order at-large elections because under Section 5 of the Voting Rights Act of 1965, the Attorney General of the United States had tendered an objection to the Louisiana Statutes which prescribed at-large elections for police juries and school boards;[7] second, that the district court applied an improper legal standard in evaluating dilution; and third, that the district court was clearly erroneous in finding that at-large elections do not dilute the voting strength of black voters in the parish. All three contentions were rejected by the panel.[8]

[7]Until 1968, Louisiana law prohibited at-large elections for School Boards and Police Juries (the law required at least five wards from which the members of these bodies were to be elected). By Louisiana Acts of 1968 No. 445 Section 1 (amending La. R.S. 33:1221) and No. 561 (adding La. R.S. 17:71.1 — 71.6), Louisiana Law was amended to allow at-large elections (or elections from less than five wards) for School Boards and Police Juries.

On April 29, 1969, Acts 445 and 561 were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. On June 26, 1969, both Acts were rejected as having "the effect of discrimination against Negro voters on account of their race, and of denying to them an effective voice in the selection of Police Jury and School Board members." On September 10, 1969 this rejection was reaffirmed by the Attorney General of the United States, citing as a specific example of racial discrimination, the at-large scheme of elections in East Carroll Parish.

[8]In all deference to the panel, we submit that they failed to give adequate consideration to Marshall's contention that the district court's finding of no dilution was clearly erroneous.

On rehearing, Marshall challenged the panel's disposition on all three grounds. Since we find his last two challenges meritorious, we need not consider his first contention concerning Section 5 of the Voting Rights Act of 1965.[9]

II.

Before proceeding further, we feel it is important to emphasize the posture in which the issues are presented in the instant case. The panel understood Marshall to contend that the district court abused its discretion in adopting a plan that did not comport with *Connor v. Johnson*, 402 U.S. 690 (1971). We do not understand Marshall to make this contention. Consequently, we need not consider whether, absent an allegation that an at-large scheme unconstitutionally dilutes the voting strength of a minority, the district court's approval of an at-large scheme would amount to an abuse of discretion under *Connor*.

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[9]Marshall contended that the rule of Connor v. Johnson, 402 U.S. 690 (1971) and Sheffield v. Itawamba County Board of Supervisors, 439 F.2d 35 (5th Cir. 1971) that court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5 is inapposite where such plans are adopted by a court in "sweetheart" lawsuits. Although there may be merit in his contention that the failure to qualify *Connor* and *Sheffield* may result in the circumvention of the Voting Rights Act, we would merely note that the dilution standard is a viable means of reconciling the disparate treatment of governmental body approved plans and court approved plans under Section 5. Furthermore, since Section 5, 42 U.S.C. § 1973c (1970), covers attempts to administer voting practices as well as attempts to enact them, *see* Roman, Section 5 Of The Voting Rights Act: The Formation of an Extraordinary Legal Remedy, 22 Am. U. L. Rev. 111, 124 (1972), the panel's decision that *Connor* and *Sheffield* govern is quite appropriate.

Marshall's contention here is that the judicially approved at-large plan is unconstitutional,[10] not merely indiscrete. Having identified Marshall's contention, we turn to a consideration of first, the proper standard for testing dilution, and second, whether the district court erred in finding that there was no dilution in the instant case.

We begin by noting that the concept of population in fair representation cases is not possessed of any talismanic quality. The Supreme Court recently affirmed this proposition in *Gaffney v. Cummings*, where it stated that "if it is the weight of a person's vote that matters, total population — even if stable and accurately taken — may not actually reflect that body of voters whose votes must be counted and weighed for purposes of reapportionment, because 'census persons' are not voters."[11] Indeed, *Reynolds v. Sims*, *supra* and its progeny[12] marked a departure from statistical

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[10]A similar contention was made in Gunderson v. Adams, 328 F. Supp. 584 (S.D. Fla. 1970) *aff'd* 402 U.S. 913 (1971) where a Florida plan, codifying a court ordered plan, was challenged and upheld.

[11]Gaffney v. Cummings, ____ U.S. ____, 37 L.Ed.2d 298, 308 (1973). Thus, census figures include aliens, nonresident military personnel, nonresident students, all of whom may be ineligible to vote. The Supreme Court and lower courts have approved apportionment based not on population but on voter registration statistics on several occasions, where such data produces a distribution of legislators not differing substantially from the use of a permissible population basis. *See, e.g.*, Burns v. Richardson, *supra* at 93, Ely v. Klahr, 403 U.S. 108 (1971); Reynolds v. Gallion Ex Rel. Attorney General of Alabama, 308 F. Supp. 803 (M.D. Ala. 1969); Pate v. El Paso County, Texas, 337 F. Supp. 95 (W.D. Tex) *aff'd*, 400 U.S. 806 (1970).

[12]*E.g.*, Gaffney v. Cummings, *supra*; White v. Regester, *supra*; Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971); Swann v. Adams, 385 U.S. 440 (1967).

niceties. Consequently, to rely upon population statistics, to the exclusion of all other factors, is to give these statistics greater sanctity than that which the law permits or requires.

More fundamentally, the application of the population measure to this case is premised upon a misunderstanding of the thrust of the dilution problem presented in this case. Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable;[13] and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. Both the Supreme Court and this court have long differentiated between these two propositions.[14] And although population is the proper measure of equality in apportionment, in *Whitcomb v. Chavis*, 403 U.S. 124, 149-150 (1971) and *White v. Regester, supra* at 324, the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength.

The district court applied a per se rule that since blacks were a majority in East Carroll Parish, the

[13]Reynolds v. Sims, *supra* at 324.

[14]*See* Gaffney v. Cummings, *supra* at 311; White v. Regester, *supra* at 324; Whitcomb v. Chavis, *supra* at 142; Abate v. Mundt, *supra* at 184 n.2; Burns v. Richardson, *supra* at 88-89; Howard v. Adams County Board of Supervisors, 453 F.2d 455, 457 (5th Cir. 1972) *cert. denied*, 32 L.Ed.2d 812 (1972). *See also* Troxler v. St. John the Baptist Parish Police Jury, 331 F. Supp. 222 (E.D. La. 1971), *appeal dismissed*, 452 F.2d 1388 (5th Cir. 1972).

at-large plan could not possibly submerge their vote. Since in *White v. Regester, supra*, the Supreme Court affirmed a district court's finding of dilution in Bexar County even though Mexican-Americans comprised a numerical majority of the population in that county, the per se rule applied by the district court below cannot withstand scrutiny. The panel also relied upon the fact that blacks in East Carroll comprised a majority of population in reaching its conclusion, but pointing to the size of the parish's population, it qualified the standard applied by the district court. We feel that this qualification, invoked to differentiate the instant case from *Connor v. Johnson*, 402 U.S. 690, 692 (1971) where the Supreme Court announced a preference for single-member districts in "large" districts, is of no moment where, as here, a showing of dilution has been made. The legal standards announced by the Supreme Court in *Whitcomb v. Chavis, supra*, and *White v. Regester, supra* in determining submergence admit of no distinction on the basis of size of population alone.

Concededly, in *Whitcomb v. Chavis, supra* at 143-44, the Supreme Court acknowledged that the aggregation of several districts into multi-member districts or an at-large scheme may enhance the potential for dilution when the population of such districts is large. But just as the magnitude of the districts did not obviate the need for petitioners to satisfy their burden of proof in *Whitcomb*, the minuteness of the population in the instant case cannot be invoked to pretermit further inquiry into the possibility of dilution in East Carroll Parish. The import attributed to population by the majority of the panel had this preclusive effect. However, we cannot sanction the view that minorities are to be

exposed and subject to apportionment schemes otherwise constitutionally infirm because the equal protection clause can be watered down on the basis of population statistics alone.[15]

We also hold that the district court erred in finding that the at-large plan did not dilute the black vote in East Carroll. In *Howard v. Adams County Board of Supervisors, supra* at 458, this court stated that to establish the existence of a constitutionally impermissible redistricting plan, plaintiffs must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that ". . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." In view of our holding that Marshall satisfied the burden with respect to the second standard, we need not entertain his contention that the departure from the firmly entrenched state policy against at-large voting in elections in police juries and school boards comes within the first standard.[16]

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[15]We acknowledge, however, that elections with respect to certain special governmental units of limited purpose are not subject to the fair representation mandates. *See* Associated Enterprises, Inc. v. Toltec Watershed Improvement District, ____ U.S. ____, 35 L.Ed.2d 675 (1973); Salyer Land Company v. Tulare Lake Basin Water Storage District, ____ U.S. ____, 35 L.Ed. 2d 659 (1973).

[16]Similar contentions have met with varying degrees of success. For cases upholding the claim that a reapportionment plan was racially discriminatory, *see* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Smith v. Paris, 257 F. Supp. 901, 904 (M.D. Ala.) *modified and aff'd*, 386 F.2d 979 (5th Cir. 1967) *on remand* United States v. Democratic Executive Committee of Barbour County, Alabama, 288 F. Supp. 943 (M.D. Ala. 1968); Sims v. Baggett, 247 F. Supp. 96, 110 (M.D. Ala. 1965). For cases in which such a claim was rejected, *see* Wright v. Rockefeller, 376 U.S. 52 (1964); Holt v. Richmond, 459 F.2d 1093 (4th Cir.)., *cert. denied*, ____ U.S. ____, 33 L.Ed.2d 343 (1972).

Neither the language quoted from Howard v. Adams County Board of Supervisors, *supra*, nor the aforementioned cases should be read to hold that a reapportionment plan can be invalidated solely because of the racial motivations of those who fashioned it. In Palmer v. Thompson, 403 U.S. 217, 224-25 (1971), the Supreme Court stated that although its past decisions contain language which suggests that motive or purpose behind a law is relevant to its constitutionality, these decisions, including Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) focused on the actual effect of the legislation being challenged, and not the reason why the legislation was enacted.

It is axiomatic that at-large and multi-member districting schemes are not per se unconstitutional.[17] Nevertheless, where the petitioner can demonstrate that "its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice," *White v. Regester, supra* at 324, *Whitcomb v. Chavis, supra* at 149-50, such districting schemes are constitutionally infirm.

The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a

[17]White v. Regester, *supra* at 324; Mahan v. Howell, *supra* at 335; Ferrell v. Hall, 339 F. Supp. 73 (W.D. Okla.) *aff'd* 406 U.S. 939, *petition for rehearing denied*, 35 L.Ed.2d 344 (1972); Gunderson v. Adams, 328 F. Supp. 584 (S.D. Fla. 1970); *aff'd* 403 U.S. 913 (1971); Dusch v. Davis, 387 U.S. 112 (1967); Kilgarin v. Hill, 386 U.S. 120, 121 (1967); Burns v. Richardson, *supra;* Fortson v. Dorsey, *supra;* Lipscomb v. Johnson, 459 F.2d 335, 337 (5th Cir. 1972); Howard v. Adams County Board of Supervisors, *supra* at 457-58.

mere disparity between the number of minority residents and the number of minority representatives.[18] Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb v. Chavis, supra,* would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination.[19] Conversely, where a minority can demonstrate a lack of access to the process of slating candidates,[20] the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision

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[18] *E.g.*, Whitcomb v. Chavis, *supra* at 149; Lipscomb v. Jonsson, *supra* at 337.

[19] Taylor v. McKeithen, *supra* at 650, n. 3. *See* Parker, County Redistricting in Mississippi: Case Studies in Racial Gerrymandering, 44 Miss. L. J. 391, 400 (1973).

[20] The Supreme Court's focus in Whitcomb v. Chavis, *supra* at 149-50, on the access of minorities to slating procedures in Marion County, Indiana, makes clear that the standards we enunciate today are applicable whether it is a specific law or a custom or practice which causes the diminution of minority voting strength.

for at-large candidates running from particular geographical subdistricts.[21] The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester, supra,* demonstrates, however, that all these factors need not be proved in order to obtain relief.

In *White*, the Supreme Court sustained the district court's invalidation of a multi-member districting scheme for the election of representatives to the Texas House of Representatives from Dallas and Bexar Counties. The Court held that the following findings of fact made by the district court concerning Dallas County were sufficient to warrant the relief fashioned: first, that the blacks had suffered a history of official racial discrimination which touched their right to participate in democratic processes; second, that the Texas requirements for majority vote as a prerequisite to nomination in a primary, though not themselves improper, enhanced the opportunity for racial discrimination; and third, that black candidates had merely nominal success in the past in electing Representatives due to the indifference of the Democratic Party which controlled candidate-slating in Dallas County. *White v. Regester, supra* at 324-25. With respect to Bexar County, the district court made similar findings concerning the history of discrimination

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[21] *Compare* Whitcomb v. Chavis, supra at 143-44, *with* Graves v. Barnes, 343 F. Supp. 704, 725 (W.D. Tex. 1972) *aff'd sub. nom.* White v. Regester, *supra*. The existence and mode of operation of voting procedures which enhance dilution is outlined in Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553-55 and accompanying notes (1973).

against Mexican-Americans and the unresponsiveness of the Bexar County legislative delegation to the interests of Mexican-Americans. The Supreme Court held that the district court's findings were sufficient to sustain the relief awarded in Bexar County. *White v. Regester, supra* at 325-26. While the instant case is not on all fours with *White v. Regester,* we hold that the record reveals facts sufficiently within its purview to warrant a repudiation of at-large elections in East Carroll Parish.

As in Dallas and Bexar Counties, minority residents in East Carroll Parish have suffered from a protracted history of racial discrimination which touched their ability to participate in the electoral process. Until 1957, they were compelled by a statute of statewide application to attend racially segregated schools until this court took action in *Orleans Parish School Board v. Bush,* 242 F.2d 156 (5th Cir.), *cert. denied,* 354 U.S. 921 (1957). Less overt but equally invalid statewide schemes which fostered the maintenance of dual schools were operative until thwarted in 1960.[22] Until 1965, voters in East Carroll were subject to a state-required interpretation test in order to qualify to vote.[23] Finally, from 1922 to 1962, no black had been permitted to register to vote in the Parish.[24] Concededly, these impediments to participation in the electoral process have since been removed. The district

[22] *See, e.g.,* Bush v. Orleans Parish School Board, 188 F. Supp. 916, 920 (E.D. La. 1960) (documenting additional circumventive artifices).

[23] Louisiana v. United States, 380 U.S. 145 (1965).

[24] United States v. Manning, *supra.*

court concluded that their removal vitiated the significance of the showing of past discrimination. This conclusion is untenable, however, precisely because the debilitating effects of these impediments do persist. *Cf. Graves v. Barnes,* 343 F. Supp. 704, 733 (W.D. Texas 1972), *aff'd sub. nom., White v. Regester, supra.* Their persistence is manifested, in part, by the fact that although blacks in East Carroll comprise a majority of the population, they constitute a minority of registered voters.

Similarly, as in Dallas and Bexar Counties, the electoral device of a majority voting requirement is operative in East Carroll Parish.[25] This device has been severely criticized as tending to submerge a political or racial minority. *Graves v. Barnes, supra* at 725, *aff'd sub. nom., White v. Regester, supra. See also Evers v. State Board of Election Comm'rs.,* 327 F. Supp. 640, 643 (S.D. Miss. 1971). This criticism is appropriate in the instant case.

The only distinction between the instant case and *White v. Regester, supra,* is that here, there is no proof that representatives of police juries and school boards in East Carroll were particularly insensitive to the interests of minority residents. While this distinction is

[25] La. Rev. Stat. Ann. art. 18, § 18:358 (1969). In addition, voters in East Carroll are subject to anti-single shot voting requirements, the effects of which though mitigated as to wards 1, 2, 4, 5, 6 and 7 under the district court's plan, are still egregious in ward 3 where 3 representatives to the police jury and school board are elected. *See* La. Rev. Stat. Ann. art. 18, § 18:351 (1969).

significant, it is not decisive.[26] We feel that this deficiency in proof is compensated for by an additional distinction between the circumstances in the instant case and *White*. In Dallas and Bexar Counties, there was a strong tradition of multi-member districting. In contrast, in East Carroll, the firmly entrenched state policy against at-large elections for police juries and school boards had persisted until as late as 1967. Moreover, although testimony elicited by the district court emphasized the fact that the problems confronting the police jury were parish-wide and hence could best be resolved by representatives sensitive to a parish-wide electorate, there is a dearth of evidence that would suggest that the police jury formerly elected by wards inadequately served parish-wide interests in the past. Indeed, we find it rather anomalous that appellees would contend that the parish is too small for there to be a dilution of minority votes under an at-large scheme, and yet too large for ward elected representatives to be responsive to parish-wide interests.

Thus, on the basis of the evidence adduced on the record, we feel constrained to find that the district

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[26] It may be that the absence on the record of any criticism of the responsiveness of the police jury and school board is attributable to an omission of proof. If so, our decision should not be interpreted as acquiescing to such omissions. However, it may be that the particular functions of the police jury, for example, do not easily lend themselves to unresponsive representation. The record establishes that the primary function of the juries is the drainage of rural farmlands, maintenance of rural roads, and the overseeing of a prison farm. Were we to hold that the absence of a claim of representation unresponsive to a minority's needs foreclosed constitutional attack, the voting strength of minorities could be freely diluted without fear of constitutional restraint. The absence of proof with respect to school boards could not be explained on such grounds.

court erred in rejecting Marshall's contention that the at-large electoral scheme would work a diminution of the black voting strength in East Carroll Parish. The confluence of factors presented in the instant case bring it well within the Supreme Court's holding in *White v. Regester, supra.*

Although the aforementioned analysis suffices to sustain our disposition, we are inclined to respond to an additional argument tendered by appellee in support of the panel's ruling. While acknowledging that the instant facts might theoretically present a case of dilution, appellee argued that 1971 and 1972 elections under the at-large plan, with the attendant success of 3 black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote. The significance attached to success at the polls in the instant case is unavailing, however, for two reasons. First, these results were not before the district court when it rendered the opinion we are presently reviewing. It is axiomatic that an appellate court cannot take cognizance of matters not passed upon by the trial court. Second, we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations — namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.

In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.

III.

We conclude our analysis in this case by returning to the point at which we began when we noted that this is not a case wherein a district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion. Where such a challenge is registered, our starting point would be *Connor v. Johnson, supra,* in which the Supreme Court announced that single-member districts are preferable to large multi-member districts. This preference is not, however, an unyielding one. As the Supreme Court admonished in *Whitcomb v. Chavis, supra* at 161, "[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited." Lest our decision today be misconstrued to narrowly circumscribe the discretion of a district court in fashioning a reapportionment plan itself free from constitutional infirmity, we would note that the preference for single-member districts may yield in two situations.

Where a district court determines that significant interests would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements, it can employ multi-member districts. *See Mahan v. Howell, supra* at 334-35. But these significant interests must not themselves be rooted in racial discrimination. *Cf. Taylor v. McKeithen, supra* at 650 n. 3; *White v. Weiser,* ____ U.S. ____, ____, 37 L.Ed.2d 335, 347 (1973).

The preference may also yield where a district court determines that multi-member districts afford minorities a greater opportunity for participation in the political processes than do single-member districts. In the process of making such a determination, a court need not be oblivious to the existence and location of minority voting strength.[27] While not required to for-

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[27]The Supreme Court has never ruled on the question of the extent to which the board equitable powers of a federal court in fashioning reapportionment decrees are limited by the colorblind concept of Gomillion v. Lightfoot, *supra* and Wright v. Rockefeller, *supra*. *See* Taylor v. McKeithen, *supra* at 650. Several courts have intimated that the colorblind concept is in fact a limitation. *See* Mann v. Davis, 245 F. Supp. 241, 245 (E.D. Va.) *aff'd sub. nom.* Burnette v. Davis, 382 U.S. 42 (1965); Ferrell v. Hall, 339 F. Supp. 73, 83 (W.D. Okla.) *aff'd*, 406 U.S. 939, *rehearing denied* ____ U.S. ____, 33 L.Ed.2d 344 (1972).

In discussing the remedial power of federal courts to fashion reapportionment decrees, the Court has cited *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971), *see, e.g.,* Taylor v. McKeithen, *supra* at 650; Sixty-Seventh Minnesota State Senate v. Beens, *supra* at 12 (Stewart, J., dissenting), thereby suggesting that such powers in fashioning reapportionment decrees are coterminous with those in fashioning desegregation decrees. Since *Swann* noted that it was permissible for a federal court to consider race in the latter situation, *Swann, supra* at 25, it would also be permissible to consider race in the former situation.

Our decision in Howard v. Adams County Board of Supervisors, *supra* is not inconsistent with the view maintained

mulate a plan that assures the success of a minority at the polls, a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes.

We acknowledge that the legal standards fashioned in this area of the law require federal courts to engage in a particularly exacting and hazardous inquiry in order to divine the proper remedial action to be taken. Justice Stewart presaged what we today acknowledge in his dissent in *Sixty-Seventh Minnesota State Senate v. Burns*, 406 U.S. 187, 32 L.Ed.2d 1, 14 (1972), when he noted that "the federal courts are often going to be faced with hard remedial problems" in reapportionment cases. Nevertheless, we are confident that federal courts can come to grips with such problems.

For the reasons set forth above, we REVERSE the decision of the panel of this court and VACATE and REMAND the judgment of the district court for proceedings consistent with our disposition.

COLEMAN, Circuit Judge, with whom INGRAHAM, Circuit Judge, joins, dissenting in part: On November 17, 1972, a majority of the Judges ordered this case reheard en banc, directing counsel to file through briefs on the issue of "dilution of the franchise of black voters" as raised in the District Court and considered

herein. In Howard, we observed that the district court was correct in noting that the organization commissioned by the legislature to draw up reapportionment plans did not consider race in its plan. Howard, *supra* at 458. We did not intimate any view as to the propriety of considering race in such circumstances.

by the panel decision.[1] Clearly, what the en banc court intended to do was to establish some standards as to what is required to "minimize or cancel out black voting strength",[2] particularly in the context of a sparsely settled governmental unit inhabited by less than 13,000 people.

With sincere deference, I fear that the intended objective has eluded the en banc opinion. Regretfully, it leaves me with no plainly discernible idea of what the District Courts are hereafter to do with this troublesome problem. Moreover, I must disagree with the effect of those portions of the opinion which I think I do understand.

The opinion appears to be anchored, in the main, on the recent decision of the Supreme Court in *White v. Regester*, dealing with conditions prevailing as to the multi-member legislative districts in Dallas and San Antonio. East Carroll Parish, Louisiana, however, is a "far cry" from either of these highly populated metropolitan areas. The Parish Seat, Lake Providence, has a population of 6,183. The remaining 450 square miles of typical rural delta terrain have 6,701 inhabitants, with an average population density of fifteen persons (not voters) per square mile. In East Carroll blacks are in a heavily preponderant majority, not in the minority as were the blacks and Mexican-Americans in Dallas and San Antonio. In *White*, the Supreme Court considering the *totality of the circumstances*,

[1]The panel opinion in this case (Judge Gewin dissenting in part) is reported, 467 F.2d 1381.

[2]Burns v. Richardson, 384 U. S. 73; Fortson v. Dorsey, 379 U. S. 433.

was not inclined to disturb the findings of the Three Judge District Court that certain conditions in the cities had led to invidious discrimination against the minority groups. In the instant appeal, the en banc majority holds a non-cancellation, non-minimization finding of the District Court to be clearly erroneous.

Let us now turn to the undisputed facts in the case presently before us.

In round figures, the Parish population is 59% black and 41% white; the voting registration is 54% white and 46% black. *The record fails to reflect the number of eligible blacks who have chosen not to register.*

With a spread of only eight percentage points between white and black registration, even in an election conducted solely on racial considerations a switch of less than five percent would reverse the expected outcome. Does such a *thin line*, even in a formerly segregated jurisdiction, amount as a matter of law to impermissible "minimization" or "cancellation" of black voting strength? I would respond in the negative, but the en banc opinion says "yes"; that any other view is clearly erroneous. Of course, divergencies of such size in constitutionally mandated population reapportionments at state and local levels do not call for per se invalidation, *White v. Regester, supra.*

One of the factors stressed in *White v. Regester* was that for nearly a hundred years only two minority representatives from Dallas County and only five Mexican-Americans from Bexar County had been elected

to the Texas Legislature. I do not know how many had been candidates nor what qualifications they possessed, but in East Carroll the en banc opinion declines to consider the unchallenged fact that in the at-large elections in East Carroll Parish in 1971 and 1972 three black candidates were elected to office, including one who previously had been defeated when running in his own ward. The opinion holds that an appellate court cannot take cognizance of matters not passed upon by the trial court. It was all right for the Supreme Court to consider election results in Dallas and Bexar for the past one hundred years but when it comes to dismembering a little parish we must blind ourselves to facts asserted on oral argument and not in the least disputed. One rule for plaintiffs and the opposite for defendants. I might add that in the eight years I have served on this Court I have frequently seen it go outside the formal record in racially oriented cases for the reason that it would not blind itself to unchallenged facts.

Obviously, the election of three black candidates in at-large elections within two years after the adoption of the plan now under review, and at a time when black registration amounted to 46% and white registration came to 54%, pretty well explodes any notion that black voting strength has been cancelled or minimized. What the en banc opinion condemns as clearly erroneous turns out to be clearly right when put to the test of actual use at the ballot box rather than in the rarified atmosphere of the judicial chamber.

Additionally, in *White v. Regester*, the at-large candidates for the legislature were not required to live in a particular zone, so that it was possible for every legislator to be elected from outside the minority areas. Indeed, the Three Judge Texas District Court felt impelled to say, and the Supreme Court quoted it, that these legislators were "insufficiently responsive to Mexican-American interests".

In East Carroll Parish, however, the candidates were required to run from specifically designated areas.

I believe that *White v. Regester* was decided on the denial of access to the political process, not on cancellation or minimization of the minority vote. In any event, a decision rendered on the facts peculiar to that case and not shown to exist in East Carroll provides faint precedential support for the en banc decision now about to be rendered.

In East Carroll Parish the black people hold a predominant population majority — 59% to 41%. It necessarily follows that the opinion of the Court in this case can only mean that in formerly "segregated" areas a black population majority is of no consequence in one man-one vote reapportionment cases unless it is also matched by a black registration majority when there is an effort to escape from the pocket borough method of electing county officials. The basic requirement, the fundamental goal, of population equality must yield to registration equality.

I submit that this is a serious distortion of the one man-one vote principle. It has to be premised on the idea that voters will always vote for candidates of their own race, an idea which has repeatedly failed the test of electoral experience, even in East Carroll Parish itself. It also overlooks the absolute certainty that with such a predominantly heavy population majority it is only a matter of time, and not too long at that, when there will be a black registration majority in East Carroll.

The en banc opinion is quite inconclusive as to what the District Court must do on remand. Apparently, however, no choice is left but to direct the division of the Parish into wards (districts). The Balkan must be fragmented into nine Balkans. After it had lost jurisdiction in this case, as set forth in the panel opinion, the District Court approved a redistricting plan submitted by the plaintiff-appellants by which three of the nine board members would be elected from one ward while the other six wards would be allowed to elect only one each. One ward would elect 1/3 of the Board while the other six would elect 1/9 each. So far as ultimate power on the Board is concerned a vote in one ward would be worth exactly three times that of a vote in any other ward. To me that certainly smells of invidious discrimination and a complete distortion of the one man-one vote rule within a small county area.

The paramount consideration in this case is that in East Carroll Parish, Louisiana, the black race is a

definite majority, not a minority.[3] Thus, the ultimate question is whether a 7% deficit in black registration cancels or minimizes the black voting strength of those who hold an 18% advantage in population. The en banc opinion says that it does, as a matter of law, and that the affirmative finding of the District Court to the contrary is clearly erroneous.

Hence, we direct a change in the election machinery of a small rural parish, where the black officials elected under the old malapportioned ward plan expressed, as the record shows, a preference for the at-large plan.

I would adhere to what the panel said originally:

> "We are unable to see how at-large elections in this small parish could possibly discriminate against its black citizens. They have a commanding majority of the total population. This majority would participate in the election of not one but of every police juror and every school board member in the parish. Every elected official would thus be answerable to all black citizens of the entire parish. On a single-member district plan, if such can be devised, the voters would have a voice in the election of only one member on the police jury or the school board. It would, therefore, be just as easy to say, in the exercise of discretion, that a single district plan in this parish would more clearly dilute the voting power of the blacks than would one in which every voter, black and white, has the same identical voice in the selection of not one, *but all* members of the elective body. As a matter of fact, the District Judge so found."

[3]The en banc opinion speaks of single-shot voting, run-off elections, and slating candidates, but these were not issues in the court below.

To the extent indicated, I respectfully dissent.

CLARK, Circuit Judge, with whom DYER, MORGAN and RONEY, Circuit Judges, join, dissenting: The majority bases its reversal of the District Court order now on appeal on two grounds: first, the District Court improperly relied on population statistics alone in evaluating the effect of the plan ordered implemented in diluting the voting strength of black citizens and second, the District Court finding of no dilution was clearly erroneous. With deference, I differ as to both grounds. Of more fundamental importance is my disagreement with Part III of the majority opinion which creates a formula to test multimember district reapportionment plans for dilution of ethnic group voting strength. The tests laid down sweep too broadly and at least they are unnecessary in view of the clear exposition of the law in this field by the Supreme Court. For all of these reasons I respectfully dissent.

I.

White v. Regester announces the legal standard to be applied in this case as succinctly and cogently as

it can be put. Omitting supportive citations, the Court stated:

> Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State.
>
> But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups.
>
> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

The Supreme Court concluded that "on the totality of the circumstances" it would not overturn the findings of the District Court

> representing as they do a blend of history and an intensely local appraisal of the design and

> impact of the Bexar County multi-member district in the light of the past and present reality, political and otherwise.

The majority epitomizes the District Court's order as one which based its determination of nondilution solely on the fact that the requirement of at-large elections eliminated any population deviation between voting units. However, I read the order to have a broader foundation. At the hearing held to determine the effect of the 1970 census upon the District Court's previous 1968 order for at-large elections, six plans were submitted to the court by the governmental agencies involved and by the black intervenor. None of these plans provided for single-member districts throughout the parish. Rather, they provided for various combinations of single and multimember districts and for various forms of parish-at-large elections with geographical residency requirements for the candidates for various posts. The evidence adduced during this hearing delved into what dilution would be brought about by the intervenor's proposed plans as compared with the dilution that would result from a parish-at-large reapportionment plan. Both forms of plans were also compared to the population proportions which existed under the pre-1968 single-member ward system.

The District Court's decree now on appeal provided in pertinent part:

> . . . the court having considered all plans presented as well as all alternate plans proposed

by the parties hereto, it has made the following finding of facts:

1. That according to the 1970 U.S. Census, East Carroll Parish has a total population of 12,884 persons of which number 7,568 are blacks and 5,306 are whites and other nationalities; that the black population of East Carroll Parish, Louisiana, comprises 58.7 percent of the total population.

2. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not.

3. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board does not dilute nor discriminate against the black population as the new voting unit from which officers of the jury and the board are to be elected is comprised of 58.7 percent blacks, or a substantial majority of blacks, while other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board.

4. That the plan recommended by East Carroll Parish Police Jury and East Carroll

Parish School Board has actually been in effect in East Carroll Parish since December 2, 1968, and the plan has not proved discriminatory against blacks.

5. That the plan represents the wishes of both public bodies, having been endorsed by two of the three black public officials now serving on these public bodies.

6. That the plan of apportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is a constitutionally acceptable plan and meets all of the requirements of the "one-man, one-vote" rule of law.

7. That the evidence adduced by intervenor failed to show that the plan offered by the two aforesaid public bodies would discriminate against blacks or in any manner dilute the black population.

I read this order as addressing two separate considerations. The first is compliance with the one-man-one-vote mandate of *Reynolds v. Sims*. The second is a factual consideration of whether parish-at-large elections which obviously solve this problem completely, might have the effect of diluting the voting strength of black voters who, while holding a majority position in total population comprise a slight minority of the registered voters in the entire parish. Findings 3, 4, 5 and 7 are expressly addressed to this second problem and, when considered in the context of the hearing

record in this case which directly dealt with the dilution of voter effectiveness on a racial basis, appear to me to go to the heart of the proper questions that should concern the trier of fact in such a case. Certainly they are not limited to population statistics alone.

There can be no serious quarrel with the abstract legal premise that bare population statistics cannot become a talisman for determining whether dilution of voting strength has occurred. However, this concession is no impediment to an insistence that the District Court and the prior panel opinion of this court were entitled and indeed required to consider the overall size of the population in this small rural parish in approving the apportionment plan involved. It is perfectly valid to compare the effect which an at-large voting plan would have on the strength of an ethnic group in East Carroll Parish with the result of any similar multimember district plan in a populous urban area such as those which have been involved in the previous Supreme Court cases to date. The opportunity for participation in a parish-at-large election among less than 13,000 people is *greater* than the opportunity to be a meaningful part of the elective process in a single-member district which numbers over 100,000 persons. Judge Dawkins also made a specific oral finding that the proposed plan was not racially motivated and did not have a racially deterrent effect in its operation. With all of these factors which were before the District Court and which obviously formed a part of its decisional process, I cannot agree that the District Court imposed a constitutionally infirm reappor-

tionment plan which watered down voting rights on the basis of population statistics alone.

The almost gossamer distinction between weighing each man's vote equally and preventing the dilution of the overall voting strength of an identifiable racial element within the electorate can be an elusive concept at best. However, it is not one which in my view escaped either the attention of Judge Dawkins in his original opinion or the panel that initally heard this appeal. With full recognition that *White v. Regester* and the other precedents cited in footnote 2 of the en banc majority opinion discuss a panoply of factors which may help identify the existence of dilution, I find no rule requiring that every such factor must be tested for and found in every case in which a dilution issue may be raised. The common denominator which all precedents demand be weighed in reaching the required ad hoc fact adjudication is: has the plaintiff met the burden of demonstrating that members of the ethnic group in question have less opportunity than do other residents in the district to participate in the political processes and to elect legislators of their choice? Though not expressed in these terms, this is the rule Judge Dawkins applied in evaluating the design and impact of this plan.

II.

I would be quick to agree that the en banc majority is correct when it states that dilution of voting strength is a question of fact. The difference between us arises because of my view that the record establishes the

decision of the trial court in this case was not clearly erroneous. For example, Judge Coleman points out with emphasis in his dissent that the record in this case fails to reflect the number of *eligible* black citizens who have chosen not to register. How the majority opinion can conclude on such a record that the plaintiffs have demonstrated that past impediments to black voting still persist in this parish and that the persistence of such impediments is manifested in the disparity between black population and black voter registration is an enigma to me.[1] Until eligibility — based on age, residence, and freedom from other disqualifications established under federal law — is compared to nonregistration, this appears to be nothing more than a tenuous assumption. However, it is an assumption which is essential to the en banc court's fact reversal of the trial court as clearly erroneous.

The proof adduced in the District Court concerning the operation of the at-large election plan which governed the 1970 elections in this parish disclosed that a black candidate in the primary election for the Police Jury was defeated by only 9 votes. Another black candidate qualified for the second primary in which he ran third, 12 votes behind the second place white candidate. A third black candidate won in his contest against the incumbent president of the Police Jury, polling more votes than any candidate, not just for this post but in the entire election.

[1]For example, the 1970 census reflects that 49.6% of the black population of East Carroll Parish is under 18 years of age as compared to only 38.5% of the white population.

In the 1972 election which was held for only three of the nine school board posts, two blacks and one white candidate were elected. If the focus is upon "the design and impact" of at-large elections "in the light of past and present reality, political and otherwise," it is manifest that here there was no dilution of the black vote. But the majority sets its blinders so that it cannot see the present political reality because the election results were not before the District Court when it rendered its judgment.

While I unqualifiedly endorse the view that we cannot take cognizance of issues not raised or evidence that could have been but was not introduced in the court below, we are confronted with neither of these factors here. The 1972 election was held subsequent to the District Court's judgment of August 2, 1971. The result of the election is *not disputed* and was proffered to us on appeal. While the appellate process is going on, we can no more halt the political and electoral processes than we can stop the clock. We should not, however, turn either of them back when they are running properly. I see nothing novel or prejudicial about the consideration of current relevant *undisputed* matters brought to our attention on an appeal from an injunction decree. Indeed, our failure to do so is to shut our eyes to present political reality in East Carroll Parish and to do violence to the basic legal principle that injunction orders operate *in future*.

Finally, I am unable to agree with the majority that the 1972 election results should not be considered because of the purely speculative possibilities that the

election of a black might serve the selfish political purposes of a white candidate, or that it would be better for a white to lose an election than to lose a law suit.

III.

White v. Regester charts a clear course for adjudicating attacks on plans involving multimember districts — which in logic of analysis are merely one form of at-large voting, differing only in the extent of the geographic area involved. I cannot help but conclude that part III of the en banc majority opinion is diametrically at variance with the simple direct rule laid down by the Supreme Court in that case. By today's decision this court creates a rule which would limit the use of multimember districts to those instances where proof can be adduced which demonstrates that a "*greater* opportunity for participation" in the political process would be afforded to whichever race may be in the minority than would be possible in single member districts, or for a showing that the use of at-large election districts "*enhances* the opportunity" for minority participation in the political process. Without regard to the fact that such proof might be well-nigh to impossible to make, the law's announced preference for single member districts in populous areas does not mean that multimember districts must overcome some stigma to survive. To require that any particular plan be demonstrated to operate so as to afford an advantage to any minority ethnic group at the polling place is not an exercise of color-blind color consciousness but a legal mandate for reverse discrimination. It is not merely a rule out of keeping with the latest law of the Supreme Court, but is a mistake of major dimensions that will place the courts squarely in the center of the "political thicket."

The trier of fact in this case did not utilize an erroneous legal principle but rather applied considerations well within the rule just announced in *White v. Regester*. The record demonstrates ample evidence to indicate that the findings of fact made by the District Court were not clearly erroneous. For these reasons I would affirm the District Court. Most certainly I would refrain from creating any new rule regarding the use of multimember districts which runs counter to the most recent pronouncement of the Supreme Court. Thus, I dissent.

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Appendix D

PART V. POLICE JURY

§ 1221. Election of police juries

Every parish governing authority in Louisiana organized under the police jury system of government, shall by ordinance, establish the size of their bodies provided that no police jury shall have less than five members nor more than the number of members serving on the police jury or, presently authorized for that police jury on July 20, 1968. Police jurors shall be elected at the state general election and shall serve for terms of four years each. Amended by Acts 1968, No. 445, § 1, emerg. eff. July 20, 1968, at 2:00 P.M.

Appendix E

SUB-PART A-1. REAPPORTIONMENT AND REORGANIZATION [NEW]

This Subpart, as enacted by Acts 1968, No. 561, §1, contained R.S. 17:63-17:68. The sections have been redesignated as R.S. 17:-71.1-17:71.6 on authority of R.S. 24:253.

Acts 1968, No. 561, §3, provides: "All laws, or parts of laws, in conflict herewith, are hereby repealed to the extent of any such conflict, such repeal to be effective January 1, 1972."

§ 71.1 Authority for reapportionment; basis

Each of the parish and city school boards, as heretofore created and organized, is hereby authorized to reapportion itself so that each member of said board represents as nearly as possible the same number of persons. Such reapportionment shall be based upon the 1970 federal census, or a special census as authorized hereinafter, and shall be accomplished and become effective when a school board has complied with the provisions of R.S. 17:71.4. Added by Acts 1968, No. 561, §1. Amended by Acts 1970, No. 319, §1, emerg. eff. July 13, 1970 at 2:00 P.M.

§ 71.2 Maximum and minimum size of boards; overlapping six year terms

In accomplishing the reapportionment authorized by this Subpart, each of said school boards may, by majority vote of said board as presently constituted, re-establish itself with not less than five nor more than

fifteen members or the number presently authorized for that school board, whichever is the greater. Whenever the size of a school board is to be changed by reapportionment, the school board may submit the proposition of size to the people.

Each school board member shall be elected for a term of six years, provided that those school boards whose members are elected for a term of four years when this Act becomes effective shall continue such term of office for its members.

The specific six year term of each member shall be so arranged approximately one-third of the members of said board shall stand for election every two years, said members to be elected at the same time and in the same election that members of the United States Congress are elected, provided that those school boards whose members are elected at a time other than the election of members of the United States Congress when this Act becomes effective shall continue such election for its members. Added by Acts 1968, No. 561, § 1. Amended by Acts 1970, No. 319, § 1, emerg. eff. July 13, 1970 at 2:00 P.M.

§ 71.3 Procedure for accomplishing reapportionment, special election districts; effective date of same

Each of the parish and city school boards shall use the federal census of 1970 as the basis upon which to accomplish reapportionment, provided however, that each of said school boards may authorize the taking of a special census to use as a basis for reapportionment. To this end, each of said school boards may employ qualified firms to take such special census, and may

employ such other consultants, attorneys, etc. as it deems desirable in order to assist such board in such reapportionment.

Each of said boards, after determining the number of members of said board after reapportionment is to be effective, may create such special school board election districts as it deems desirable which districts need not be coterminous with, nor have any relation to, the wards or precincts that may be created by the police jury or cities or towns within and for said parish or city, but any such special school board election districts created as a result of this Subpart must be compact and contiguous. The board may provide that all or part of its members shall be elected from such districts and may provide that one or more of its members may be elected at large from each of such districts.

If the board so desires, it may provide that all of the members of said board, as reapportioned, shall stand for election for two, four, and six year terms in order to maintain the overlapping terms and election of approximately one-third of such board every two years. If, on the other hand, the board so desires, and equitable apportionment can be established and maintained, it may provide that reapportionment be accomplished over a six-year period so that only certain members will stand for reelection the first year, as reapportioned, while others will stand for reelection, as reapportioned, two and four years later.

The special school board election districts provided for herein shall be for the purpose only of electing school board members and shall not be for the purpose

of levying taxes or issuing bonds. The creation of such special election districts shall not affect existing tax or bond districts and same shall remain in full force and effect as otherwise provided by law. Added by Acts 1968, No. 561, § 1. Amended by Acts 1970, No. 319, § 1, emerg. eff. July 13, 970 at 2:00 P.M.

§ 71.4 Effective date of such reapportionment

After each of said school boards has decided on its make-up, as reapportioned, it shall adopt a resolution, establishing the size of the board, terms of office of its members, date of election of its members and boundary lines of its special election districts, and stating the effective date of such reapportionment. This resolution shall be published in the official journal of the board and shall become effective and have the status of law as of the date specified in said resolution. Added by Acts 1968, No. 561, § 1. Amended by Acts 1970, No. 319, § 1, emerg. eff. July 13, 1970 at 2:00 P.M.

§ 71.5 Reapportionment every ten years

Each of said boards is authorized to again reapportion itself as set forth herein, based upon the census taken in 1980, and each of such boards is authorized to again reapportion itself every ten-year decennial thereafter, such reapportionment to be effective in time for the elections in the second year thereafter. No school board shall reapportion itself more often than every ten years. Added by Acts 1968, No. 561, § 1. Amended by Acts 1970, No. 319, § 1, emerg. eff. July 13, 1970 at 2:00 P.M.

§ 71.6 Purpose and intent of subpart; status during interim period

The purpose and intent of this Subpart is to authorize all school boards to reapportion themselves so that each member thereof represents as nearly the same number of constituents as is possible as required by recent decisions of the United States Supreme Court. It is also the purpose and intent of this Subpart to permit such school boards as much latitude and discretion as possible in accomplishing such reapportionment within the limits set forth herein

During the interim period between July 13, 1970 and the reapportionment of a school board in accordance with the provisions of this Subpart, the present laws with regard to the election of school board members shall remain in full force and effect. Provided, however, that whenever a school board accomplishes reapportionment, as required and set forth herein, such presently existing laws shall immediately cease to apply to said school board. Added by Acts 1968, No. 561, § 1. Amended by Acts 1970, No. 319, § 1, emerg. eff. July 13, 1970 at 2:00 P.M.